

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

ARCHIE W. SWIFT,

Defendant-Appellant.

UNPUBLISHED

April 15, 2003

No. 239715

Wayne Circuit Court

LC No. 01-006162

Before: Jansen, P.J. and Kelly and Fort Hood, JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of possession with intent to deliver less than 50 grams of a controlled substance, MCL 333.7401(a)(iv), and felony-firearm, MCL 750.227b. He was sentenced to one to twenty years in prison on the controlled substance conviction, and to the mandatory, consecutive, two-year term for the felony-firearm conviction. Defendant appeals as of right. This appeal is being decided without oral argument pursuant to MCR 7.214(E).

During a pre-raid surveillance of a house involved in cocaine trafficking, defendant was twice observed selling cocaine. During the subsequent raid, two officers followed defendant into the house and saw him throw a gun in some debris near a stairway. Defendant was arrested immediately afterwards. He was searched and rocks of cocaine were discovered in his pocket.

Defendant first argues that there was insufficient evidence to establish that he possessed the firearm *during* the commission of the felony. He contends that there was no evidence he had the gun during the observed drug transactions, nor was there evidence to show he had reasonable access to the gun during the felony of possession with intent to deliver cocaine. We disagree. Testimony at trial indicated defendant threw the gun away immediately before he was arrested and was found with the cocaine. This evidence was sufficient to establish that he had the gun while committing the crime of possession.

Defendant also argues that, absent a departure, he should have received lifetime probation for the controlled substance conviction under the Statutory Sentencing Guidelines, MCL 777.1 *et seq.* The sentencing court erroneously concluded that MCL 333.7401(2)(a)(iv) “trumped” the sentencing guidelines. MCL 769.34(2)(a) and (5) provide that the statutory penalty for a given crime controls only when the penalty prescribed is mandatory. Since a sentence of one to twenty

years' was an option under § 333.7401(2)(a)(iv) but was not mandated, and lifetime probation was another option under the statute, the statutory sentencing guidelines controlled. Since the sentencing guideline range for the controlled substance conviction was zero to 11 months, the court effectively departed from the guidelines when it sentenced defendant to prison for a minimum of twelve months.

However, the trial court indicated that it would have departed from the guidelines based on the fact that this crime occurred in a residential neighborhood and noted the presence of nearby schools. Defendant asserts that this factor was taken into account by the scoring of the offense variables, and that under MCL 769.34(3)(b) it therefore may not be considered in departure. We again disagree. While offense variable 15 was scored for drug trafficking, there was nothing in the scoring to account for the fact that the trafficking took place in a residential neighborhood and in close proximity to schools. This factor "keenly" grabs our attention and we deem it of "considerable worth" in determining the length of a sentence. Accordingly, we conclude that there was a substantial and compelling reason for the departure. See *People v Babcock (Babcock II)*, 250 Mich App 463, 466-467; 648 NW2d 221 (2002).

Affirmed.

/s/ Kathleen Jansen
/s/ Kirsten Frank Kelly
/s/ Karen M. Fort Hood